No. 86-39 (2)

In The

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*, IN SUPPORT OF THE PETITION

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On July 15, 1986, petitioner Burlington Northern Railroad Company, and seven other railroads, filed a petition with this Court for the issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court in *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes,* 793 F.2d 795 (7th Cir. 1986). Because the respondent union believes that the issues raised by the railroads' petition need to be resolved finally and conclusively by this Court so that improvidently issued injunctions never again deprive a labor organization of its full economic power at a time when that power is clearly

needed, respondents Brotherhood of Maintenance of Way Employes [hereinafter, "BMWE"], *et al.*,[1] support the issuance of the writ, albeit for reasons different than those advanced by petitioners.

OPINIONS BELOW

The opinion of the court of appeals has been reported at 793 F.2d 795. To respondents' knowledge, the opinion of the district court is not officially reported.

COUNTERSTATEMENT OF THE CASE

Although respondents do not fully agree with petitioners' statement of the case, including their description of the operation of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, that statement, in respondents' opinion, adequately explains the factual setting in which this case has arisen. Consequently, respondents do not consider it necessary to correct what it believes are several inaccurate and, in some cases, omitted, statements. Rule 34.2 of the Rules of this Court. However, several events have occurred since the petition was filed which, in respondents' opinion, are relevant to the Court's consideration of this petition.

On July 21, 1986, the status quo mandated by Section 10 of the Railway Labor Act, 45 U.S.C. § 160, expired, and respondent BMWE was free once again to exercise its right of self-help to resolve its disputes with the Maine Central Railroad and Portland Terminal Company [hereinafter, "MEC" and "PT," respectively] over the modification of various agreements. Respondent BMWE did

[1] Respondents are the International Union and 17 individuals who are either officers of the International or of its subordinate units. The individual respondents are listed at page ii of the railroads' Petition.

not exercise that right, but rather, instructed its members to continue to work while their union sought to negotiate a resolution of the disputes. Notwithstanding the union's forebearance, the MEC and PT imposed new work rules on August 6, 1986, which reduced the rates of pay by 20%, required employees to pay 50% of their health and welfare benefits, and promulgated other changes to the employees' working conditions. *See,* 132 Cong. Rec. H6000 (Remarks of Rep. Snowe); H. Rpt. No. 99-784, 99th Cong., 2d Sess. at 4 (1986). Respondent BMWE successfully continued to urge its members not to strike, and responded to the new work rules and rates of pay by filing suit against the MEC and PT in the United States District Court for the District of Maine (*BMWE v. MEC,* D. Me. Civil Action No. 86-0251-P) to enjoin the changes made by those railroads. Respondent BMWE's request for a Temporary Restraining Order was denied on August 11, 1986.

On August 12, 1986, Congress intervened in this matter and passed a Joint Resolution (H.J. Res. 683, 99th Cong., 2d Sess.; 132 Cong. Rec. H5998-6001 and S11427-28 (August 12, 1986)) which extended the status quo that existed on July 20, 1986, for a sixty day period; that is, until September 18, 1986.[2] That Joint Resolution was signed by the President on August 21, 1986.[3] Consequently, at the present time respondent BMWE may not engage in self-help activities to resolve its major disputes

[2] That Joint Resolution has been reproduced herein as Appendix A for the convenience of this Court. Besides extending the Section 10 status quo period, the Resolution created a 3 member board to report to the Congress not later than 10 days prior to the expiration of the 60 day extension. App. A at § 2.

[3] On August 22, 1986, the MEC and PT filed suit in the United States District Court for the District of Maine against the BMWE seeking a declaratory judgment that the Joint Resolution violates the Constitution of the United States, in particular, the Due Process clause of the Fifth Amendment and the Separation of Powers doctrine. The MEC and PT are also seeking an injunction to prevent respondent from enforcing that law. *MEC v. BMWE,* D. Me. Civil Action No. 86-0263-P.

with the MEC and PT. However, unless an agreement is reached which resolves these disputes, or unless Congress once again intervenes, as of 12:01 a.m. on September 18, 1986, respondent BMWE will no longer be restrained by the Railway Labor Act from exercising its right to self-help, including its right to engage in secondary picketing.

REASONS FOR GRANTING THE WRIT

1. Effective collective bargaining is clearly dependent upon mutual respect for the strength of the other parties' economic power, and once one party believes that it can withstand the other's economic power with little or no serious economic consequences, the very foundation of collective bargaining is threatened. The temptation to test what is perceived to be a superior strength will lead to a desire to force changes in rates of pay, rules or working conditions, rather than accomplish those changes by exerting every reasonable effort to reach an agreement on those proposed changes. *See,* 45 U.S.C. § 152, First. Respondents respectfully submit that the Railway Labor Act was premised on the assumption that labor's and management's economic powers were equally balanced. *See generally, Texas & New Orleans R.R. v. Brotherhood of Railway Clerks,* 281 U.S. 548, 570-71 (1930).

Unfortunately, for at least the past twenty years, our nation's railroads have been questioning rail labor's ability to maintain a strike and have been devising various strategisms to strengthen their own ability to outlast a strike action. Such strategisms include, for example, a mutual aid arrangement by which railroads which are not being picketed reimburse the railroads experiencing job actions for their lost revenues.[4] Also, technological

[4] While respondent BMWE reasonably believed from reports which it had received that the Guilford Rail System (*i.e.,* the rail system which controls MEC and PT) was participating in a mutual aid arrangement with

(footnote continues)

changes have enabled the railroads to rely more heavily upon their supervisory forces to continue train operations during strikes. These strategisms and technological changes have led to a belief that a railroad can operate successfully *through* a strike, and this, in turn, has led to more rigid bargaining by rail management. This form of bargaining has increased the threat of strikes in the rail industry.

In order to counter rail management's belief that rail strikes can be outlasted with acceptable costs, rail labor has called upon rail employees on railroads which are not being struck to support the employees who are on strike. This case presents such a situation of a call for rail labor solidarity and it brings into question two crucial issues: (1) whether Congress, in enacting the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.,* has withdrawn from federal courts the power to enjoin rail labor's peaceful request for mutual aid; and (2) whether such a call for aid is unlawful under the Railway Labor Act. Respondent BMWE agrees with petitioners that these questions are extremely important to the rail industry today, for the validity of rail labor's ability to ban together for its mutual aid and protection clearly affects rail labor's bargaining power and the entire collective bargaining process in the rail industry today.

(footnote continued)

petitioners, petitioners have denied such a connection with the Guilford system, and respondents have no concrete evidence which disputes that denial. However, the record in this case shows that a mutual aid plan exists among petitioners and most of the major railroads of this country, although MEC and PT are not participants. Affidavit of J.J. Marchant in N.D. Ill. No. 86-C-2486. The magnitude of that arrangement may be seen from the fact that in 1978 during the strike by the Brotherhood of Railway and Airline Clerks against the Norfolk & Western Railway, it was estimated that the Norfolk & Western was receiving approximately $800,000 per day in strike insurance payments. *See,* The Washington Post, September 27, 1978 at A14, Col. 2.

2. Petitioners maintain, albeit erroneously, that secondary picketing is prohibited by the Railway Labor Act, and that Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, notwithstanding its literal language, does not deprive federal courts of jurisdiction to enjoin peaceful secondary picketing. While those arguments have been rejected by the Seventh Circuit in this case, and by the three other circuits which have addressed these and comparable arguments in the past few months,[5] the fact remains that two circuits—*i.e.*, the Fifth [6] and Eighth [7]—have previously adopted interpretations of the Norris-LaGuardia Act which enable federal courts to examine the wisdom of a union's decision to engage in secondary picketing, again notwithstanding the plain language of the Norris-LaGuardia Act which prohibits any

[5] Respondent BMWE's position that it has a right to engage in peaceful secondary picketing in the rail industry without fear of an injunction has been upheld by the following appellate courts, besides the Seventh Circuit: *Richmond, F.&P. R.R. v. BMWE,* 4th Cir. No. 86-3544, decided July 11, 1986, *Norfolk & W. Ry. v. BMWE,* 4th Cir. No. 86-3555, decided July 11, 1986, *pet. for cert. pending,* Sup. Ct. No. 86-175; *Central Vermont Ry. v. BMWE,* 793 F.2d 1298 (D.C. Cir. 1986); *Consolidated Rail Corp. v. BMWE,* 792 F.2d 303 (2d Cir. 1986). These issues are pending before the First Circuit in *BMWE v. Guilford Transportation Industries, Inc.,* 1st Cir. No. 86-1366, and before the Third Circuit in *Pittsburgh & L.E. R.R. v. BMWE,* 3rd Cir. No. 86-3321 (held in abeyance pending decision by district court on motion to dismiss or to transfer).

[6] *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.,* 362 F.2d 649 (5th Cir.), *aff'd by an equally divided Court,* 385 U.S. 20 (1966).

[7] *Ashley, Drew & Northern Ry. v. UTU,* 625 F.2d 1357 (8th Cir. 1980). Although petitioners maintain that *Ashley Drew* and *Atlantic Coast Line* both adopted the "substantial alignment" test, that is incorrect, for the *Atlantic Coast Line* court's "economic self-interest" test is much broader; while its test was satisfied in that case by a substantial alignment between carriers, it was also satisfied by the interests of the employees whose aid was being sought because of their economic interests which would be affected by a resolution of the primary dispute. 362 F.2d at 655. As the Seventh Circuit observed in the case at bar, neither test is found in the Norris-LaGuardia Act, for Congress left it up to the unions and to the employees in the rail industry on whom the call for help is made to determine if such a call is within their economic self-interest. BN Pet. at 22a-23a.

such inquiry into union motivation. Even though this Court has concluded that such an inquiry into union motivation is contrary to the Norris-LaGuardia Act (*e.g., Jacksonville Bulk Terminals, Inc. v. ILA,* 457 U.S. 702, 715-20 (1982); *see also, Order of Railroad Telegraphers v. Chicago & North Western Ry.,* 362 U.S. 330, 335-36 (1960)), the law as it exists today in at least three circuits [8] enables the railroads to ask federal courts in those circuits, and in the four other circuits which have not addressed this issue,[9] to make such an inquiry. In view of the predisposition of many trial courts to enjoin rail picketing unless it is clearly authorized (*see generally,* BN Pet. at 40a-43a), rail labor still faces the very real potential of having legitimate calls for secondary pressure improvidently enjoined in several circuits.

The impact of federal court intervention on respondent BMWE's recent efforts to engage in secondary picketing shows very clearly the need for a uniform rule on the issues presented by this petition. Respondent sought to engage in secondary picketing against non-Guilford railroads (see note 4, *supra*) in early April 1986, but was enjoined by three separate district courts from picketing major carriers.[10] While two of the district courts were

[8] Since the *Atlantic Coast Line* case was decided by the Fifth Circuit before the Eleventh Circuit was formed, that case also governs the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981)(en banc).

[9] The Ninth Circuit, in a non-railroad case, rejected the *Atlantic Coast Line* and *Ashley Drew* tests in *Smith's Management Corp. v. IBEW,* 737 F.2d 788 (9th Cir. 1984).

[10] Respondent was enjoined by the district courts for the Western District of New York (*Conrail* case; preliminary injunction issued April 6), for the Northern District of Illinois (*BN* case; TROs issued April 9, 10 and 11; preliminary injunction issued April 23) and by the Western District of Virginia (*Norfolk & Western* case; TRO issued April 11; preliminary injunction issued April 22).

considering whether to grant preliminary injunctions to replace their Temporary Restraining Orders, the National Mediation Board [hereinafter, "NMB"] recommended to the President that he create an Emergency Board under Section 10 of the Railway Labor Act to investigate the BMWE's disputes with the MEC and PT. But for the first time in the history of the Railway Labor Act, the President did not act immediately on the NMB's recommendation. *See,* H. Rpt. No. 99-784, *supra,* at 3. Instead, as the White House explained in its press release which accompanied the Executive Order which finally created the Emergency Board in this case on May 16, 1986 (*i.e.,* Executive Order No. 12,557, 51 Fed. Reg. 18,429 (1986)), the President delayed creating the Emergency Board because the federal courts had enjoined secondary picketing of the major carriers and, thus, had prevented the disruption to commerce from rising to the level which, in the President's opinion, justified his intervention. White House Press Release of May 16, 1986 at 1, reproduced hereto as Appendix B at 1-2. On May 15, 1986, the Second Circuit stayed the injunction prohibiting picketing of Conrail, and on May 16, 1986, the President created the Emergency Board after respondent began to picket that carrier. *Id.* at 2-3.

This factual history shows that the strike, and its impact both on employees and on the Northeast portion of this Country, was extended by over one month by injunctions which were subsequently found to have been issued improvidently. While the courts which issued those injunctions may have protected the major carriers which sought federal court assistance, those courts, nevertheless, in effect ignored the impact of the strikes on other portions of the rail system and, more important, frustrated the statutory scheme which Congress has established to protect the overall public interest—*e.g.,* Section 10 of the Railway Labor Act.

In 1932, Congress informed the judiciary when it enacted the Norris-LaGuardia Act, that the federal courts were no longer to be engaged in the "labor injunction business." *E.g., Marine Cooks & Stewards v. Panama Steamship Co.,* 362 U.S. 365, 369 (1960). If the district courts had heeded that admonition in this case and in other rail strikes in which the issue of secondary picketing has arisen (*e.g., Alton & Southern Ry. v. BRAC,* 99 L.R.R.M. 2323 (D.D.C.), *aff'd* 99 L.R.R.M. 3326 (D.C.Cir.), *cert. denied,* 439 U.S. 996 (1978)), lengthy strikes could have been shortened by about 50%. Moreover, if the railroads knew that they could not look to the federal courts to enjoin secondary picketing, the need for rail labor to engage in self-help may never have arisen in the first place.

Respondent BMWE respectfully submits that so long as there is a split in the circuits on the test to be applied to determine whether the federal courts are still in the labor injunction business—*i.e.,* whether the literal terms of the Norris-LaGuardia Act apply, or whether the federal courts can apply a judge-made exception to the literal terms chosen by Congress—railroads will seek the aid of the federal courts to enjoin conduct which Congress deliberately has left unregulated and immune from federal court injunctions. Consequently, as it stated in its earlier filings with this Court on these issues (*i.e.,* Sup. Ct. Nos. 85-1792 and 85-1852), respondent BMWE urges this Court to grant a writ of certiorari in this case to review and to affirm the Court of Appeals' decision.[11]

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[11] While it is impossible to predict at this time what will happen on or after September 18 when the extension of the status quo expires, it is clear that this case will not be moot. Even if a settlement of the primary disputes is reached, the issues in this case are obviously capable of repetition in factual situations which evade review because of the short life span of most rail labor strikes. *E.g., Roe v. Wade,* 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911).

CONCLUSION

Respondents BMWE, *et al.*, respectfully submit that the writ of certiorari should be granted.

Respectfully submitted,

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Date: August 29, 1986

APPENDIX A

Ninety-ninth Congress
of the
United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday,
the twenty-first day of January,
one thousand nine hundred and eighty-six

H. J. Res. 683
JOINT RESOLUTION

To provide for a temporary prohibition of strikes or lockouts with respect to the Maine Central Railroad Company and Portland Terminal Company labor-management dispute.

Whereas the labor dispute between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and certain of the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees threatens essential transportation services of the Nation;

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained;

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers;

Whereas it is desirable to resolve such dispute in a manner which encourages solutions reached through collective bargaining;

Whereas the President, pursuant to section 10 of the Railway Labor Act (45 U.S.C. 160), by Executive Order No. 12557 of May 16, 1986, created a Presidential Emergency Board to investigate the dispute and report findings;

Whereas the recommendations of Presidential Emergency Board No. 209 for settlement of such dispute have not yet resulted in a settlement; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the final paragraph of section 10 of the Railway Labor Act (45 U.S.C. 160) shall apply and be extended for an additional period of 60 days beginning on July 21, 1986, with respect to the dispute referred to in Executive Order No. 12557 of May 16, 1986, so that no change, except by agreement, shall be made by the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, or by the employees of such carriers in the conditions out of which such dispute arose as such conditions existed before 12:01 ante meridiem of March 3, 1986.

SEC. 2. (a) Not later than 10 days prior to the expiration date of the 60-day period referred to in the first section of this joint resolution the board established under subsection (b) shall submit to the Congress a full and comprehensive report containing—

(1) the progress, if any, of negotiations between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees;

(2) findings of fact regarding financial and other circumstances related to the dispute described in this resolution, including, but not limited to, developments since March 3, 1986; and

(3) recommendations for a proposed solution of the dispute described in this resolution, including, but not limited to, the issues covered by Presidential Emergency Board Number 209.

(b) The National Mediation Board shall appoint a three-member board for the purpose of preparing and submitting the report described in subsection (a). No member appointed to

such board shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of such members shall be fixed by the National Mediation Board. The second paragraph of section 10 of the Railway Labor Act shall apply to the expenses of the board established under this subsection as if such board were a board created under such section 10.

(c) The board appointed under subsection (b) shall terminate upon the submission to the Congress of the report required under subsection (a).

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

APPENDIX B

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release May 16, 1986

The President announced today that he has established, effective May 16, 1986, Presidential Emergency Board No. 209, to investigate and make recommendations for settlement of current disputes between the Brotherhood of Maintenance of Way Employes (BMWE) and the Maine Central Railroad/Portland Terminal Company.

The Maine Central Railroad/Portland Terminal are owned by Guilford Transportation Industries, which also owns the Boston & Maine and Delaware & Hudson railroads. Most of the traffic handled by the Guilford railroads, which are concentrated within the northeast section of the United States, originates on other rail carriers and is transferred to the Guilford lines at key interchange points. The Guilford roads interline traffic with several other major railroads, including Conrail, CSX, and Norfolk Southern.

A strike called by the BMWE against the Maine Central/ Portland Terminal subsequently spread to the other Guilford railroads. A further escalation of the dispute occurred in April when the BMWE initiated a class action suit against the Association of American Railroads contending that certain railroads had provided Guilford assistance under a mutual aid arrangement. Picketing was initiated by the BMWE on April 10, 1986, against selected railroads outside the Guilford system. However, as a result of considerable litigation following this escalation in the job action, several Federal courts issued orders restraining the BMWE and other unions from picketing. Important issues under the Federal labor laws have been presented in these cases, the speedy and final resolution of which is of great importance to labor-management relations in this industry and to the efficient movement of rail traffic in interstate commerce. The recent conflicting decisions of the

Federal courts, permitting in some cases picketing of carriers not involved in the basic dispute, however, made Presidential emergency action necessary in the interim.

Three Federal court jurisdictions have permitted picketing by the BMWE of railroads outside the Guilford system. The Central Vermont Railway was denied a preliminary injunction by the United States District Court and the United States Court of Appeals for the District of Columbia. The Richmond, Fredericksburg and Potomac Railroad was denied a preliminary injunction on appeal before the United States Court of Appeals for the Fourth Circuit, and most importantly, Conrail was denied injunctive relief on May 15, 1986 , when the United States Court of Appeals for the Second Circuit dissolved an injunction granted on suit by Conrail.

Conrail operates 13,400 miles of lines in 15 Northeast States as well as the District of Columbia and Canada. In 1985, Conrail was involved in transporting 15 percent of all traffic loaded by the nation's railroads. In the Northeast alone, Conrail accounts for over 30 percent of all freight loaded by rail. It also provides connecting service with almost all major railroads operating in the South and West. More than half of Conrail's traffic is carried in connection with other railroads, as part of joint-line movements. Over one million carloads each year move onto Conrail lines from another railroad, and close to half a million carloads are forwarded by Conrail to another railroad. The effects of a strike against Conrail would therefore extend to most other large carriers throughout the country, even if they were not directly involved in the strike itself.

Picketing by BMWE employees of the Conrail system, including such key points as Chicago, Illinois, St. Louis, Missouri, Cleveland, Ohio, Buffalo, New York, and Elkhart, Indiana, began on May 15, 1986. This action, if continued, could result in layoffs of 80,000 workers in key rail-served industries within the first two weeks and a total of 135,000 workers if the strike continued for a full month, in addition to the 35,000 nonmanagement employees of Conrail. Beyond the loss of revenues to the railroad, the strike would halt production of approximately $85 million worth of goods per day and could

mean layoffs of 65,000 in motor vehicles manufacturing, 30,000 in steelmaking and other primary metals production, and 10,000 each in coal mining, chemicals production, and the pulp and paper industries. A strike against Conrail would also halt Amtrak passenger trains carrying 45,000 travelers each week —approximately ⅛ of total Amtrak intercity passengers.

Consequently, the President invoked the emergency board procedures of the Railway Labor Act, which in part provide that the board will report its findings and recommendations for settlement to the President within 30 days from the date of its creation. The parties must then consider the recommendations of the emergency board and endeavor to resolve their differences without engaging in self-help during a subsequent 30-day period. It is not anticipated that the creation of the emergency board will inhibit the prompt and final resolution of the important issues of Federal labor law pending in connection with this dispute.